No. 12,561

United States Court of Appeals
For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of the Territorial Insurance Commissioner, Attorney General of Alaska and the Territorial Commissioner of Labor, and JOHN LANDRO,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

R. E. ROBERTSON,
Seward Building, Juneau, Alaska,
ROBERT V. HOLLAND,
BOGLE, BOGLE & GATES,
Central Building, Seattle 4, Washington,
Attorneys for Appellant.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant asks for a rehearing because it believes the Court in its opinion of August 10, 1951, notwithstanding its serious consideration for nearly 8 months of the points upon which appellant urges it is entitled to a reversal, overlooked competent, relevant evidence and either overlooked or disregarded applicable principles of law sustaining appellant's appeal.

POINT I.

UNDER THE WORKMEN'S COMPENSATION ACT OF ALASKA THE ALASKA INDUSTRIAL BOARD'S FINDINGS, DECISION AND AWARD MUST BE BASED UPON COMPETENT EVIDENCE, AND NOT UPON EX PARTE, HEARSAY, UNVERIFIED, OR OTHER INCOMPETENT EVIDENCE, WHEREAS THE BOARD'S DECISION AND AWARD AND ITS FINDINGS HEREIN WERE BASED UPON EX PARTE, HEARSAY, UNVERIFIED, OR OTHER INCOMPETENT EVIDENCE AND THEREFORE WERE NOT CONCLUSIVE UPON THE DISTRICT COURT.

Doctors LeCocq and Williams' letters were both unverified and hearsay. (Appellant's main brief, 18-20). Appellant at all times objected to their admissibility; in fact, in its Admission of Service and Answer to Application put Landro on notice of its objections to all *ex parte* evidence (R. 41, par. 9).

To admit them to supplement other evidence violates the rule announced by the U. S. Supreme Court in *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* infra, just as much as though admitted to contradict other evidence. To argue they may be used to supplement other evidence, in appellant's judgment, simply begs the question of their incompetency and inadmissibility.

Appellant doubts if it had offered an unverified letter by Doctor Gray or any other physician stating Landro had recovered from his injury on October 1, 1948, or that Landro's testimony was false, that it would have been admitted in evidence. Appellant is convinced it wouldn't have been admissible.

Landro's statements (R. 48, 59) of what LeCocq and Williams told him are not only the veriest hearsay but also self-serving.

Furthermore, under the well known rules appellant cited in its brief (p. 19-23), Landro was not qualified to testify to what caused his condition.

To premise the Board's award of compensation to injured fishermen or any other kind of employee upon the Board's ability "to judge by their appearance, conduct and demeanor what amount of labor, if any, they may be able to perform" (Op. 3) is to base it upon the Board's personal knowledge, which may be founded upon surmise, conjecture, hearsay, or anything else, and, appellant submits is clearly within the rule laid down by the U. S. Supreme Court: "In such cases Commissioners cannot act upon their own information, as could jurors in primitive days." *Interstate Commerce Com. v. Louisville & N. R. Co.*, infra.

Appellant would have no means, except by mental telepathy, to be apprised of the evidence submitted or to be considered, nor could it cross-examine the members of the Board as to their source of information.

The governing rule was announced by the United States Supreme Court, viz.:

> But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation

> or rebuttal. In no other way can a party maintain its rights or make its defense.
>
> *Interstate Commerce Com. v. Louisville & N.R. Co.,* 227 US 88, 93, 57 L.ed. 431, 434,

which rule was reaffirmed in

> *Bridges v. Wixon,* 326 US 135, 89 L.ed. 2103.

This rule applies in Alaska, whose legislature has no authority to deprive appellant of due process of law or of the equal protection of the laws, which deprivation necessarily results by violation of the rule.

The Board has no authority to violate this rule announced by the U. S. Supreme Court, and the Board's Rule 13, in admitting hearsay or other incompetent evidence, necessarily is illegal.

Alaska's legislature is a legislative, not an administrative, body; hence, necessarily the Federal Administrative Procedure Act doesn't apply to it; but, such fact is entirely immaterial, because the legislature's acts are subject to the Constitution of the United States.

Rules, such as the Board's Rule 13, and the administration of them as the Board did in its award in this and the companion *Lathourakis* case, undoubtedly lead to the enactment of the Administrative Procedure Act in Congress' attempt to prevent Federal administrative bodies, similar to the Alaska Industrial Board, from depriving persons of their constitutional rights.

Appellant is cognizant of the theoretical rule advocated by Wigmore. But, fortunately, even as admitted

by Wigmore (Volume 1, p. 83, 3rd ed.), the majority of the courts refuse to recognize a theory that, if practiced, would deprive litigants of the American principles of justice by which their constitutional rights are protected against the threat of hearsay, with its lack of cross-examination to establish the truth and to destroy rumor, gossip, and falsehood.

It is of grave moment if the Court lays down or even intimates that in its circuit a litigant cannot claim and rely upon the right of cross-examination; but, seemingly if this Court in either this or the companion *Lathourakis* case, upholds its present opinion, at least by implication it thereby announces that that right does not exist in hearings before the Alaska Industrial Board.

Appellant predicts that such announcement would eventually lead to rumors, newspaper articles, and unsworn hearsay of all kinds becoming admissible even in the courts.

Dr. Gray said specifically that on September 30, 1948, he was of the opinion Landro's "temporary disability could be terminated on October 1, 1948," (R. 21-22) and that in March, 1949, he told Landro, "I felt his condition was not related to the injury." (R. 24, also 26).

Appellant submits there is no other competent evidence either of the termination of Landro's temporary disability or of Landro's condition in March, 1949.

Nor is there any competent contradiction of Gray's opinion on October 29, 1948, that: "I felt that the

subjective symptoms represented a disability of about 10 per cent, and I recommended that if his claim was in order, it could be closed on such an award." (R. 18, 19).

Appellant urges that Landro has been paid in full all of the temporary disability compensation to which he is entitled, and that there is no competent evidence that his temporary disability ended on any date other than on October 1, 1948.

POINT II.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ALLOW AND ASSESS AN ATTORNEY'S FEE OF $200.00, OR ANY SUM, TO LANDRO FOR SERVICES OF HIS ATTORNEY IN THE PROCEEDINGS BEFORE THAT COURT.

Appellant submits that this Court's opinion disregards the fact that when Section 43-3-17, ACL 1949, reading:

> "In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court."

was enacted on April 1, 1946 (Ch. 9, ASL 1946,—Appendix A, Appellant's Brief), attorney's fees were not allowed as costs in ordinary civil actions under Chapter 58, ASL 1937, which was then in effect.

Chapter 84, ASL 1947, now Section 55-11-55, ACLA 1949, was not enacted until March 27, 1947.

But, the allowance of costs under Section 55-11-55 is controlled by Section 55-11-52, ACLA 1949, and this

proceedings is not within the purview of the latter section.

Appellant submits that it is unthinkable the Territorial Legislature, without plain words, would enact a law requiring an injured employee to pay his employer's attorney fee should an appeal from the Board's award to the District Court result favorably to the employer, yet surely, if an unsuccessful employer may be forced to pay it, so in justice and fair play should the employee, if he loses in the District Court.

WHEREFORE appellant prays that it may be granted a rehearing, but should it be denied that a further stay of 30 days may be granted.

Dated, Juneau, Alaska,
September 7, 1951.

Respectfully,
R. E. ROBERTSON,
ROBERT V. HOLLAND,
BOGLE, BOGLE & GATES,
Attorneys for Appellant.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay; and that both points are meritorious, and the first is of grave import to the welfare of Alaska and to the administration of justice therein.

Dated, Juneau, Alaska,
September 7, 1951.

R. E. Robertson,
Of Attorneys for Appellant.